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FACULTY OF LAW

Constitutional Law "B"
Professor L. Weinrib

Faculty of Law, University of Toronto
2013-2014

Volume I

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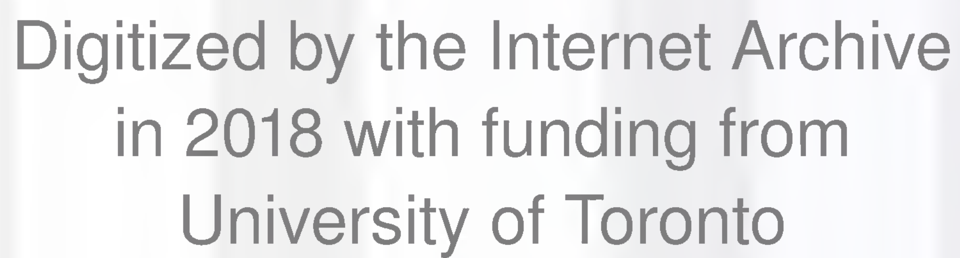
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CHAPTER 1: KEY CONCEPTS AND INSTITUTIONS

(Univ of Alberta, Centre for Constitutional Studies, Keywords) http://www.law.ualberta.ca/centres/ccs/keywords/?id=20

Constitutionalism

'Constitutionalism' is a term that is central to understanding the enterprise of adopting, interpreting and amending constitutions, including the Canadian Constitution, and yet, it is a term that is extremely difficult to define. This difficulty arises in part because of the existence of multiple constitutional traditions tied to a variety of political philosophies (liberal, libertarian, socialist); each of which views constitutions as devices that both reflect and further a particular set of political beliefs.

At its core, however, 'constitutionalism' embodies two basic commitments. First, constitutionalism means that a political community should be governed by some basic or fundamental rules which delineate an institutional framework within which other sorts of decisions - be they general decisions about policy, or particular decisions regarding specific individuals or entities - are made. In the liberal constitutional tradition, for example, as Stephen Holmes has argued, these rules serve both an enabling and disabling function. They serve an enabling function by creating institutions to make decisions, conferring powers upon them, and laying down rules for these institutions which allow the decisions to be made. They serve a disabling function by limiting the scope of the powers of institutions, through devices such as the separation of powers, federalism, and bills of rights. The enabling aspect of 'constitutionalism' cuts across many political philosophies; the disabling function of 'constitutionalism', for some (e.g. communitarians) is quite controversial. Second, 'constitutionalism' means that the framework must be stable, so as to provide an enduring set of expectations regarding the behaviour of political institutions. In the liberal constitutional tradition, the commitment to stability has been synonymous with legal constitutionalism, that is, with a constitution that is written, supreme (i.e. which prevails over conflicting law), entrenched (i.e. difficult to amend) and justiciable (i.e. enforceable in the ordinary courts). But here again, there are many political communities (e.g. the United Kingdom) which adhere to the principles of liberal constitutionalism, but whose constitutions lack some of these features.

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Constitution Acts

The 'Constitution Acts' are a set of statutes enacted by the Imperial Parliament, beginning with the *Constitution Act, 1867* ((U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5), and culminating in the *Constitution Act, 1982* (being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11), that lay down much of the framework of government in Canada. There are thirteen statutes in total. Of these, the 1867 and the 1982 Constitution Acts are the most important.

The first of these statutes brought the three original confederating colonies of British North America into the Dominion of Canada together, divided that Dominion into four provinces, and distributed jurisdiction between the federal and provincial governments, either exclusively or concurrently (see division of powers). Other provisions create and partially define the powers of the executive and legislative branches of both the federal and provincial governments and the superior courts. The second of these statutes, *inter alia*, contains the *Canadian Charter of Rights and Freedoms*, provisions regarding the rights of aboriginal

peoples, and procedures for constitutional amendment.

The other eleven statutes alter the legal framework established by the *Constitution Act, 1867*, either by amending the text of that statute, or conferring new powers or imposing new obligations on the federal government and/or the provinces. For example, the *Constitution Act, 1940* (3-4 George VI, c. 36 (U.K.)) amended section 91 of the *Constitution Act, 1867* to add unemployment insurance to the list of areas over which the federal government has jurisdiction.

It would be a mistake to regard these statutes as exhaustive of the Constitution of Canada. First, according to section 52(2) of the *Constitution Act, 1982*, the Constitution of Canada consists of not only these statutes, but also a number of other imperial statutes and orders, as well as Canadian statutes. The most important of these admitted British colonies in existence at the time of Confederation to Canada (*e.g.* Newfoundland) and created the Prairie provinces (*e.g.* Alberta). Second, as Peter Hogg has argued, this list omits a number of statutes and imperial instruments which create and define the powers of important institutions, and hence which are of a constitutional nature, such as the *Supreme Court and Exchequer Courts Act, 1875* (S.C. 1875, c. 11; now called the *Supreme Court Act*, R.S.C. 1985, c. S-26), and the *Letters Patent Constituting the Office of Governor General of Canada, 1 October 1947*. Third, reflecting the largely unwritten nature of the British constitutional order out of which much (but certainly not all) of our Constitution emerged, the Canadian Constitution has a significant unwritten component, consisting of common law rules alterable by ordinary legislation (*e.g.* prerogative powers of the Crown), unwritten rules which prevail over inconsistent legislation (see *Reference Re Quebec Secession* and secession), and legally unenforceable rules of political morality (see convention).

Rule of Law

'The 'rule of law' is mentioned in the preamble to the *Constitution Act, 1982*. It refers to no one single idea, but to a cluster of ideas. It is a term often associated with the English legal scholar Albert Venn Dicey who described the 'rule of law' as a paramount characteristic of the English Constitution. It was comprised of three "kindred conceptions": (1) that government must follow the law that it makes; (2) that no one is exempt from the operation of the law - that it applies equally to all; and (3) that general rights emerge out of particular cases decided by the courts (Dicey, 1885 at 175-84). According to Dicey, the last conception would provide a role for the judiciary in stemming what was called "collectivist" legislation. The English judiciary could police legislative activity "to ensure that legal change was slow paced and conservative" (Sugarman, 1983 at 110).

The concept of 'rule of law' emerged as an important constitutional principle in the case of *Roncarelli* v. *Duplessis* ([1959] S.C.R. 121). The Supreme Court concluded that Quebec Premier Maurice Duplessis, could not unlawfully strip Mr. Roncarelli of his restaurant liquor licence without the proper legal authority. The Court ruled that Premier Duplessis exceeded his statutory authority when he revoked Roncarelli's licence solely on the ground that he was a Jehovah's Witness. According to Frank Scott, the McGill constitutional law professor who represented Mr. Roncarelli before the Supreme Court, the case stands for the proposition that "no public officer has any power beyond what the law confers upon him" or, more plainly, "that all are equal before the law" (Scott, 1959 at 48).

The Supreme Court in the *Reference re Secession of Quebec* ([1998] 2 S.C.R. 217) identified the 'rule of law' as one of the "underlying principles" upon which Canada's Constitution is founded. The 'rule of law', according to the Court, guarantees the supremacy of law over persons and government, and that the exercise of public power requires a source in some legal rule (see also *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721.). At its most basic level, the Court wrote, the rule of law provides a shield for individuals from "arbitrary state action" - this is the role it performed in the Roncarelli case (*Reference re Secession of Quebec* at paras 70-71). The Court went even further, suggesting that the 'rule of law', as a foundational principle of constitutional law, "may in certain circumstances give rise to

substantive legal obligations" (Reference re Secession of Quebec at para 54). This suggests that a principle implicit in Canada's constitutional order can override otherwise constitutionally valid acts of Parliament or the legislatures - a troubling idea for a constitutional democracy.

Others have argued that the 'rule of law' is a constitutional principle which limits arbitrary government action (Monahan, 1995). This argument became prominent in the controversy over the Federal government's cancellation of a contract to privatize (to hand over from public to private hands) a terminal at Toronto's Pearson Airport. The cancellation of the contract, it was argued, amounted to a violation of the 'rule of law' for which a court would be empowered to intervene. Courts however, have not relied upon the 'rule of law' to declare legislation invalid. Rather, the rule of law has required only that legislators follow the constitutionally-proscribed framework for law making.

The 'rule of law' is now common parlance in political discourse. We see it invoked in all contexts by differing political perspectives. The British historian E.P. Thompson famously described the rule of law as being a "cultural achievement of universal significance" (Thompson, 1975 at 265). If the 'rule of law' idea has such wide-spread appeal, it should not be surprising to find that it is a resource over which political contests will continue to be fought far into the future.

Supremacy of Parliament

Democracy is known as "government by the people". Representative democracy acknowledges that it is impossible to have every decision made by multitudes of individuals, and it therefore creates various institutions to make laws and other decisions required in the day-to-day life of the state. The two main models of representative democracy – parliamentary democracy and constitutional democracy – differ in their institutional design.

In a parliamentary democracy, the Parliament is supreme and no other governmental institution has the power to nullify its laws. If a citizen finds a certain law repugnant, his only option is to mobilize a change in Parliament (for example, by campaigning in favour of a certain issue or by joining a political party), such that Parliament changes that law. There is nothing a citizen can do against a law that is believed to have violated his rights other than push for political change.

In a constitutional democracy, Parliament is not omnipotent. Its powers are constrained by the Constitution. In most constitutional democracies, if a citizen believes that a certain law violates a certain provision in the Constitution, she can file an action in a court of law. Courts have the power of judicial review on the constitutionality of legislation. If the court finds that the law does indeed violate the Constitution, it can strike the law down.

Prior to 1982, Parliamentary supremacy reigned in Canada. The *British North America Act* set the division of powers between Parliament and the provincial legislatures where each legislature was supreme such that, within its jurisdiction, no other institution had the power to declare its laws unconstitutional. This situation changed in 1982 with the adoption of the *Canadian Charter of Rights and Freedoms* as part of the *Constitution Act, 1982*. This Act prescribes that "the Constitution of Canada is the supreme law of Canada" (s.52). Thus constitutional supremacy replaced Parliamentary supremacy in Canada. Consequently, if Parliament or any provincial legislatures now enact a law which violates a section of the *Charter*, a court has the power to strike this legislation down.

Some commentators argue however, that since s. 33 of the *Charter*, the notwithstanding clause, allows Parliament and the provincial legislatures to override certain provisions of the *Charter*, Canadian legislatures are still partially supreme.

Convention

A 'convention' is an uncodified rule of a constitution considered binding on political actors but not enforceable by the courts. The constitution of a country is comprised of both written or codified rules enforced by courts, and 'unwritten' rules or principles necessary for constitutional government. While conventions are more binding upon political actors than mere usages, it is not true that they are less binding than constitutional law. There is no particular hierarchy of types of constitutional rules. In many cases, constitutional conventions are more important than written constitutional provisions. What separates a convention from constitutional law is that the former is not judicially enforceable. Courts may recognize the existence of a 'convention', and even help define its nature and scope, but they do not provide remedies for the breach of conventions.

While Canada's Constitution is most often associated with its 'written' documents – chiefly, the *Constitution Act, 1867* and the *Constitution Act, 1982* – in fact, Canada's full constitutional framework is unintelligible without reference to a prodigious set of constitutional conventions. Consider two examples. Nowhere in Canada's constitutional documents is it written that the government of the day must resign when it loses the confidence of the legislative assembly. Yet this central tenet of responsible government is at the core of Canadian constitutionalism, and a political crisis would ensue were its principles ignored by political actors. Similarly, while in a strictly legal sense the Governor General may refuse his or her assent to a Bill duly passed by both houses of Parliament, a constitutional convention has developed whereby the withholding of assent would be unconstitutional (see reservation and disallowance).

Conventions arise when there are precedents for a particular principle or practice; when political actors consider themselves or ought to consider themselves bound to follow the principle or practice; and when there are good reasons for the existence of the principle or practice. While the core meaning of a 'convention' may be clear, questions of application frequently arise, and political actors may heatedly dispute what precedents apply and what reasons are legitimate. While political actors, for example, are agreed on the confidence convention, what sort of measure exactly constitutes a withdrawal of confidence may be controversial.

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- *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

Division of [Legislative] Powers [between federal and provincial governments]

The term 'division of powers' refers to the distribution of legislative jurisdiction under the Canadian Constitution. More particularly, the distribution is set out in various sections of the *Constitution Act, 1867*. The key provisions are contained in sections 91 and 92 of the *Act*, although there are other relevant sections as well. After the *Act* establishes the Parliament of Canada and the legislatures of the provinces, it then assigns particular enumerated heads of power to Parliament and the provincial legislatures. Under a doctrine of exclusivity, each level or order of government (through Parliament and the legislatures) is granted exclusive powers with the implication that the other order or level of government is excluded from enacting legislation relating to those powers.

Generally, the federal list of enumerated powers in section 91 is concerned with national matters while the provincial list in section 92 is concerned with local matters. For example, the federal list includes such matters as the power to pass laws for the peace, order and good government of Canada, the regulation of trade and commerce, criminal law and procedure, direct and indirect taxation, banking, currency, defence, navigation and shipping patents, copyrights, etc. The provincial list includes such matters as direct taxation, municipal institutions, local works and undertakings, the administration of justice, property and civil rights and matters of a merely local and private nature in the province.

Some matters under section 92 are actually federal powers. By operation of section 91(29), any exceptions within section 92 are within federal jurisdiction. In particular, section 91(10) lists such exceptions thus providing federal jurisdiction over interprovincial transportation and over communications. As mentioned earlier, sections 91 and 92 are not exhaustive in the sense that there are other sections assigning legislative jurisdiction as well. For example, jurisdiction over education is assigned to the provinces under section 93; concurrent jurisdiction (see concurrency) over agriculture and immigration is assigned to both Parliament and the provincial legislatures under section 95; as is jurisdiction over old-age pensions and supplementary benefits under section 94A. The authority to create a final court of appeal as well as any additional court is assigned to Parliament under section 101.

When one looks at the particular enumerations assigned to each level or order of government, one might reach the conclusion that the more important enumerations are in fact assigned to the federal Parliament. At the very least, one could say that the more important economic enumerations are assigned to Parliament, with the further observation that the federal economic enumerations, when taken as a whole, give Parliament authority over the national economy.

In examining the division of powers, however, it is misleading to rely on the written text of the *Constitution Act, 1867*. That is so because the written text provides only a basic understanding as to which level or order of government has the power to do what. Rather, a fuller understanding is gained through a study of the case law in which the Judicial Committee of the Privy Council (up to 1949) and the Supreme Court of Canada (since 1949) determine the scope of each enumerated power or head of jurisdiction. For example, the cases tell us that the federal authority to regulate trade and commerce extends to inter-provincial trade and so-called 'general' trade while the provinces have jurisdiction over intraprovincial trade. Moreover, the cases also tell us what is meant by 'interprovincial' trade, 'intraprovincial' trade and 'general' trade. This process of interpretation of the meaning of the written text of 1867 by the courts applies to most of the major or important enumerations in sections 91 and 92. Therefore, an awareness of the courts' interpretations is vital in realistically understanding the division of legislative powers in Canada.

Constitutional Rights

Constitutional rights are the most highly guaranteed freedoms within a legal system. In Canada, constitutional rights can be exercised by individuals or groups against the government, or by one level of government against another; either way, constitutional rights are always held against the government. If a claimant successfully argues in court that his, her, or its constitutional rights have been violated, the court may decide to fix the rights violation by issuing a remedy.

The Canadian legal system sets out individuals' constitutional rights in the Canadian Charter of Rights and Freedoms;[i] these are often called *Charter* rights, which are held by individuals against the Federal and provincial governments. When an individual successfully proves in court that the government has violated her *Charter* rights, the government must then prove that the violation is justified in a free and democratic society.[ii] If the government is unsuccessful in justifying the violation of rights, then a court

remedy will be issued.[iii] Sometimes, the government can then choose to use the "notwithstanding clause" outlined in section 33… .[iv]

Some constitutional rights are held against the government by groups rather than individuals. Aboriginal rights, for example, are recognised and affirmed in section 35(1) of the *Constitution Act, 1982*.[v] These include a variety of rights which can be claimed by an Aboriginal person on behalf of the recognised Aboriginal group to which he or she belongs.[vi]

The *Constitution Act, 1867*[vii] creates constitutional rights of a different type: in sections 91 and 92, it distributes particular powers to each level of government under our federal structure (the division of powers). Many early constitutional cases in Canada centred around the respective rights of each level of government to legislate over particular areas or subject matters.[viii] Courts have developed various interpretive tools in order to analyse whether a level of government is legislating within its constitutional powers, or whether it is infringing on the powers of the other level of government.

In Canada, constitutional rights are held against the government, and these rights are entrenched in the Constitution. This means that the Constitution would need to be amended through a complex procedure in order for rights to be modified, created, or repealed. But there are also non-constitutional rights that encompass a broader range of entitlements and freedoms enjoyed at law. These are found at common law and in statutes. For example, an individual has the common law right to use and enjoy her property without interference from her neighbours, and a non-citizen has the statutory right to apply for citizenship when he meets the criteria set out by the *Citizenship Act*.[ix] However, because these rights are not constitutional, they can be changed by government legislation.

[i][i] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 7 (the "Charter").

[ii] Ibid, s 1.

[iii] See Schachter v Canada, [1992] 2 SCR 679, for example, where the remedies of striking down, suspended declarations of invalidity, "reading down" and "reading in" are discussed.

[iv] See Charter, supra note 1, s 33(1): "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter."

[v] Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 35.

[vi] An Aboriginal right is only made out if the activity claimed to be at the core of the right is "integral to a distinctive culture," which requires a connection to be made between a right and a group; see R v Van der Peet, [1996] 2 SCR 507 at para 47.

[vii] Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

[viii] For example, the Federal Government has power over criminal law and banking, which might sometimes conflict with provincial powers over "property and civil rights" or "Matters of a merely local or private Nature".

[ix] Citizenship Act, RSC 1985, c C-29, s 3.

Judicial Review

In Canada, as well as in many other constitutional democracies, there are two types of 'judicial review' – judicial review on administrative acts [and sub-legislative legal rules], and judicial review on the constitutionality of legislation. Both types of 'judicial review' are based on the idea of the rule of law. This idea means that not only citizens, but also governments' officials, are subject to the law. If these

officials do something that the law does not allow them to do, the courts are allowed to nullify their actions.

The first type of 'judicial review' involves the actions of the executive branch of government. In the modern state it is impossible for the legislature to address every administrative decision (such as the decision to issue or to refuse to issue a business license), therefore, many statutes endow various governmental authorities with administrative powers. If a person believes that a certain governmental authority has exercised its power in an arbitrary, discriminatory, or otherwise unreasonable way, she can file a suit in a court of law and ask for 'judicial review', that is, to ask that the court review the administrative decision. If the court finds in favour of the plaintiff, it can annul the administrative decision. [This type of judicial review is typically studied in law school courses in Administrative Law.]

The other type of 'judicial review' does not involve the actions of the executive branch, but rather the actions of the legislative branch. S. 52 of the *Constitution Act, 1982* provides that "the Constitution of Canada is the supreme law of Canada". S. 24 of the same Act guarantees the right for individuals to challenge legislation which does not conform with the Constitution thereby giving Canadian courts the power to engage in 'judicial review' on the constitutionality of legislation. The purpose of this type of 'judicial review', also referred to as "constitutional review", is to ensure that legislation conforms to the Constitution of Canada. The Constitution regulates two different areas – the division of powers between the federal and provincial government, and the rights guaranteed to every Canadian against both levels of government. Consequently, there are two ways in which an act of a legislature or of Parliament might be unconstitutional. First, when the act is enacted by a provincial government while the relevant subject matter of the act is under Federal jurisdiction (or vice versa) (see division of powers). Second, when this act violates the *Charter of Rights and Freedoms*.

When a court strikes down legislation on division of powers grounds, it does not mean that the content of law itself violates the constitution. Rather, it means that the institution which enacted the law (a provincial legislature or Parliament) violated the Constitution [by exceeding is allocated legislative jurisdiction and encroaching on the allocated legislative jurisdiction of the other level of government]. Consequently, if there is a strong public interest in enacting this legislation, the appropriate institution can enact this act. Conversely, when a court strikes down legislation on *Charter* grounds, it means that the content of the law violates the Constitution, and no legislature could properly enact this law [unless extraordinary measures are taken, see below]. For this reason, 'judicial review' on *Charter* issues is often criticized as illegitimate since it gives to the judiciary the power to block important legislative initiatives [enacted by an elected and accountable democratic legislature].

The obvious response to this criticism is that when the courts nullify legislation that violates the Constitution, it enforces this document, not the judicial will. An objection to this response is that the language of the *Charter* is very open-textured, and refers to abstract concepts such as "freedom of expression". People could reasonably disagree about the meaning of such concepts, and therefore courts would not really enforce "the *Charter*". Rather, they impose their own subjective reading of the ambiguous language of the *Charter*. Since judges are not democratically elected, and cannot be replaced in office by the public will, their own view of the *Charter of Rights and Freedoms* has no legitimacy.

The question pertaining to the legitimacy of constitutional review is poignant for every constitutional democracy and is not unique to Canada. It has been the subject of a vast body of literature in the past century. The two most common responses to this question are as follows. First, precisely because the Constitution's language is ambiguous, it needs interpretation by an authoritative institution. For the reason that part of the purpose of the *Charter*, indeed of the entire Constitution, is to protect minority groups and individuals, it should not be enforced and interpreted by majoritarian institutions such as the legislature. Judges are not elected and are not accountable, and therefore they are best capable of

interpreting the constitution in a way that will protect minorities.

Second, while courts have the power to strike down legislation based on their reading of the constitution, in reality judicial decisions are not final, and legislatures have their ways to respond to a judicial decision with which they do not agree. The constitutional mechanisms for such legislative action are judicial appointments, constitutional amendments, and in Canada, the use of the notwithstanding clause.

Aboriginal Self-Government

'Aboriginal self-government' generally refers to the exercise of jurisdiction by Aboriginal peoples over their lands and the members of their nations or communities. This jurisdiction can be either inherent or delegated.

Inherent jurisdiction arises from an Aboriginal right of self-government. To establish such a right, the Supreme Court has held that an Aboriginal people has to prove that the specific jurisdiction being claimed was exercised by them as part of the practices, customs and traditions that were integral to their distinctive culture at the time of assertion of Crown sovereignty (see *R.* v. *Pamajewon*, [1996] 2 S.C.R. 821). However, it appears that a right of self-government can also arise in relation to other Aboriginal and treaty rights as a result of the communal nature of those rights (see *Campbell* v. *British Columbia*, [2000] 4 C.N.L.R. 1 (B.C. S.C.)). If an Aboriginal people is successful in proving a right of self-government, and the Crown fails to prove that it was extinguished prior to 17 April 1982, it would have been recognized and affirmed by the Constitution as an existing Aboriginal right at that time.

Delegated jurisdiction arises from delegation of authority, usually from the Parliament of Canada through legislation. For many people, this is not true self-government, as it depends on and is subject to parliamentary power and control.

The extent of the jurisdiction that can be exercised depends on either the scope of the right of self-government, or on the delegating legislation. Some Aboriginal nations claim that they have an inherent right to govern all aspects of their nation's affairs, and that their relationship with Canada is a nation-to-nation relationship that is not governed by the Canadian Constitution.

Judicial Committee of the Privy Council

From 1867 until 1949 the 'Judicial Committee of the Privy Counsel' (JCPC), a British institution, served as Canada's highest court of appeal. Ottawa abolished appeals to the JCPC in 1949. Until then, the Supreme Court of Canada was subordinate, not supreme. Its decisions could be appealed to the JCPC. Furthermore, provincial court of appeal decisions could be appealed directly to the JCPC, bypassing Canada's Supreme Court altogether.

The JCPC played a vital, controversial role in the evolution of Canadian federalism. The *British North America Act, 1867* (renamed *Constitution Act, 1867* in 1982) created an 'imperial federation.' The federal Parliament retained the same imperial powers over ... [provincial legislation] (see reservation and disallowance) that London enjoyed over the ... [colonial legislation]. The division of powers also gave the federal government the most significant government powers of the time. The intent was clear: Canada was to be a very centralized country. Ottawa should lead in building a national economy and society; the powers of provinces should be limited so they could be nothing more than "glorified municipal institutions."

The JCPC's interpretation of the division of powers disappointed the champions of a centralized federation and delighted those who wanted the provinces to be Ottawa's equals. In the first seventy years

after Confederation the JCPC authored an expansive interpretation of section 92 (especially the provincial jurisdiction over property and civil rights). This expansive interpretation of provincial power came at the expense of several of the federal powers outlined in section 91 (especially the trade and commerce power and the power to legislate for the Peace, Order, and Good Government of Canada).

Debates over the appropriateness of the JCPC's role in re-balancing federal and provincial powers in Canada foreshadowed today's debates about the role the courts are playing as interpreters of the *Canadian Charter of Rights and Freedoms*.

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Supreme Court of Canada

The 'Supreme Court of Canada' is the final court of appeal in constitutional (and other) cases. It also provides advice on constitutional questions when asked to do so by the federal or provincial governments as it did, for example, in 1981 on the question of the constitutionality of the patriation of the Constitution (see *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753). The Supreme Court was created in 1875 but until 1949 its decisions could be appealed to the Judicial Committee of the Privy Council in Britain. It was also possible until 1949 for litigants to go directly to the Privy Council from the provincial appeal courts. For the first century of its existence, the Court was very conservative and unassertive in its judgements. There was a marked change however in 1973, following the appointment of Bora Laskin as Chief Justice. In 1975 the Supreme Court gained substantial, although not complete, control over what cases it will hear. Since the entrenchment of the *Canadian Charter of Rights and Freedoms* within the Constitution in 1982, the Court has played the important role of interpreting the fundamental rights of Canadians. As a result, the Court has moved from relative obscurity to centre stage in Canada's political system. The resignation of a chief justice is now headline news across the country.

The Court is composed of nine justices, appointed by the federal government, three of whom must be from Quebec. As a matter of longstanding practice, three justices are chosen from Ontario, one from Atlantic Canada and two from the western provinces. The Supreme Court tries to reach unanimous verdicts but that is not always possible. Dissenting judgements are published along with the majority opinion and are often scrutinized by lawyers for clues about the direction in which the Court may be moving. Supreme Court decisions are binding on all lower courts in Canada. The Court is not bound to follow precedents created by the Judicial Committee of the Privy Council or its own earlier decisions, but it departs from them reluctantly and only with careful explanation of its reasons for doing so.

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